Supreme Court, U.S.
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No. 99-1012

In The

Supreme Court of the United States

ELAINE A. SCARFO,

Petitioner,

v.

VICTOR GINSBERG, DBG 94, INC., DBG 95, INC. and DBG 96, INC.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

Prior to determining whether it should consider Petitioner's Question Presented for Review, this Court should consider the following question:

Is it appropriate for this Court to consider the question of whether the determination of "single employer" status under Title VII of the Civil Rights Acts of 1964, 42 U.S.C. §2000e *et seq.*, as amended ("Title VII"), is a threshold issue of subject matter jurisdiction to be resolved by the trial court, and not by a jury, where:

(a) Petitioner failed to properly raise this issue before the United States Court of Appeals for the Eleventh Circuit; and

(b) It is unlikely that this Court would reach the question which Petitioner has presented for review, particularly in light of the fact that Petitioner waived any right she may have had to a jury trial on any alleged disputed issues of material fact concerning "single employer" issues, by expressly consenting on the record to having the District Court conduct an evidentiary hearing to resolve any such issues of fact, and by not requesting that a jury determine those issues until after the Magistrate Judge already had completed a five-day evidentiary hearing and issued his report and recommendation on the "single employer" issues?

DISCLOSURE STATEMENT PURSUANT TO RULE 29(6)

Pursuant to Rule 29(6) of the Rules of the Supreme Court of the United States, Respondents DBG 94, INC., DBG 95, INC. and DBG 96, INC. (collectively, the "Corporate Respondents"), by and through their attorneys, notify the Court that none of the Corporate Respondents has a corporate parent or any nonwholly owned subsidiaries.

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STATEMENT OF THE CASE

Petitioner's Statement of the Case omits important aspects of the procedural history of this matter including, but not limited to, Petitioner's waiver of her right to a jury trial on the "single employer" issues. Respondents offer the following as a more complete account of the relevant history of this matter.

A. Proceedings in the District Court

On October 26, 1993, Petitioner filed a Title VII action in the United States District Court for the Southern District of Florida ("District Court"), against Dr. Victor Ginsberg ("Dr. Ginsberg") and certain corporate defendants controlled by him, i.e., DBG 94, Inc. ("DBG 94"), DBG 95, Inc. ("DBG 95") and DBG 96, Inc. ("DBG 96") (collectively "Corporate Defendants"), claiming that she was subjected to a sexually hostile work environment and was discharged in alleged retaliation for allegedly insisting that the alleged acts of harassment cease.

None of the Corporate Defendants was an "employer, within the meaning of Title VII, i.e., none of the Corporate Defendants employed at least fifteen (15) employees for at least twenty (20) weeks in 1992, when the alleged harassment allegedly occurred. However, Petitioner contended that the District Court nevertheless had jurisdiction over her Title VII claims because the Corporate Defendants, together with Dr. Build, Inc. ("Dr. Build"), Dreamline Cabinet Systems, Inc. ("Dreamline") and an additional corporation, Galaxy Frame, Inc. ("Galaxy"), **none of which were named as defendants**, constituted a single "employer" which, allegedly, did employ at least

fifteen (15) employees for at least twenty (20) weeks in 1992.

On January 23, 1995, after the parties had engaged in discovery, Respondents filed a Motion for Summary Judgment or, Alternatively, Motion for Partial Summary Judgment ("Summary Judgment Motion"). In their Summary Judgment Motion, Respondents contended, *inter alia*, that the undisputed material facts, demonstrated as a matter of law, that: (a) DBG 95, Dr. Build and Dreamline did not constitute a "single employer" under Title VII; (b) Galaxy was not part of a "single employer" together with DBG 95, Dr. Build and Dreamline; and (c) even if DBG 95, Dr. Build, Dreamline and Galaxy constituted a "single employer," that entity did not employ fifteen (15) or more employees for at least twenty (20) weeks during 1992.

On November 9, 1995, the Magistrate Judge, to whom the District Court referred Respondents' Summary Judgment Motion, issued a Report and Recommendation ("1995 Report"), in which he recommended denial of Respondents' Summary Judgment Motion in its entirety, finding generally that there were "substantial issues of material fact on the single and/or joint employer issue" (App. D to Pet., at 45a).[1] After Respondents filed their Objections to the 1995 Report, on January 31, 1996, the District Court issued a one-page Order which affirmed the Report in its entirety, without specifically addressing any of Respondents' Objections to the Report (App. E to Pet.).

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[1] References to the Appendix to the Petition for a Writ of Certiorari are denoted by "App. ___ to Pet." References to the Appendix to this Response are denoted by "App. ___".

On February 20, 1996, the District Court held a pretrial conference. At that conference, Respondents asserted that the District Court was required to conduct an evidentiary hearing regarding the "single employer" issues in order to determine whether it had subject matter jurisdiction (App. A, at 2a-3a). Counsel for Petitioner responded as follows:

> MR. WEISBERG: What the defendant is raising goes to how the whole trial should be conducted . . . **defendant has indicated they believe the Court, not the jury, should ultimately make the decision on the subject matter jurisdiction, and we don't quarrel with that, and how I would foresee presenting the case is that Judge Moreno did this.**
>
> . . . [W]e present the case simultaneously to the jury, and where there is certain evidence that would just go to subject matter jurisdiction. [sic] We would then just present that to the Court.

(App. A, at 3a-4a) (emphasis added). Based on Petitioner's agreement to have the District Court determine the "single employer" issues, the District Court then referred the "single employer" issues to a Magistrate Judge (the "Magistrate") for an evidentiary hearing and the issuance of a report and recommendation (App. A, at 6a).

The Magistrate conducted evidentiary hearings on the "single employer" issues on May 14, June 6 and 7 and September 11 and 12, 1996. On December 2, 1996, the Magistrate issued a Report and Recommendation ("Report"), in which he recommended that the District Court dismiss the action (App. C to Pet.).

After resolving any and all disputed issues of fact regarding the "single employer" issues in favor of Petitioner, the Magistrate concluded that DBG 95, Dr. Build and Dreamline constituted a "single employer" (App. C to Pet., at 29a-31a).[2] However, the Magistrate further concluded, based on the undisputed facts, that, as a matter of law, Petitioner "[had] not establish[ed] the high degree of interrelatedness between **Galaxy** and DBG 95, Dr. Build and Dreamline Cabinets" necessary for **Galaxy** to be deemed part of that "single employer" (App. C to Pet., at 33a) (emphasis added). The Magistrate went on to conclude, based on the undisputed material facts, that, as a matter of law, the "single employer" consisting of DBG 95, Dr. Build and Dreamline lacked the minimum fifteen (15) employees required under Title VII (App. C to Pet., at 37a).

Petitioner filed Objections to the Report. In her Objections, Petitioner contended for the first time that, under *Garcia v. Copenhaver, Bell & Associates*, 104 F.3d 1256 (11th Cir. 1997), the jury, and not the trial court, should determine alleged disputed issues of fact regarding the "single employer" issues. On March 20, 1997, the District Court heard oral argument on those Objections. On June 17, 1997, the District Court issued an Order of Dismissal, affirming the Report ("Dismissal Order") (App. B to Pet.). In so doing, the District Court applied a **summary judgment standard** and determined that: (a) the undisputed material facts established that, as a matter of law, **Galaxy**

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[2] The parties had stipulated that neither of the other Corporate Defendants, i.e. DBG 94 or DBG 96, had any employees.

could **not** be deemed part of a "single employer" together with DBG 95, Dr. Build and Dreamline; and (b) the entity consisting of DBG 95, Dr. Build and Dreamline lacked the minimum fifteen (15) employees required under Title VII (App. B to Pet.).

B. Disposition by the Court of Appeals for the Eleventh Circuit

Petitioner appealed the District Court's Dismissal Order to the United States Court of Appeals for the Eleventh Circuit ("Eleventh Circuit"). In her submissions to the Eleventh Circuit, Petitioner did not challenge Eleventh Circuit precedent which held that whether a defendant in a Title VII case was an "employer," within the definition of Title VII, was a threshold issue of subject matter jurisdiction. *See Virgo v. Rivera Beach Associates, Ltd.*, 30 F.3d 1350, 1359 (11th Cir. 1994). Instead, Petitioner, relying on *Garcia v. Copenhaver, supra*, contended that even if "single employer" determinations involved threshold issues of subject matter jurisdiction, the District Court, nevertheless, did not have the authority to resolve alleged disputes of material facts regarding "single employer" issues because such issues were intertwined with the facts relating to the elements of a cause of action under Title VII.

In their Answer Brief, Respondents urged the Eleventh Circuit to affirm the District Court's Dismissal Order for the following reasons:

A. Under Eleventh Circuit precedent, as set forth in *Sosa v. Airprint Systems, Inc.*, 133 F.3d 1417 (11th Cir. 1998), the District Court had no authority to consider

whether Respondents, together with Dr. Build, Dreamline and Galaxy, constituted a "single employer," because Petitioner named only one of the four (4) corporations which Petitioner contends collectively constitute a "single employer, " i.e. DBG 95, as a defendant in her complaint;

B. Petitioner waived whatever right she otherwise may have had to have a jury determine any disputed material issues of fact regarding the "single employer" issues, by expressly consenting on the record in open court to having the District Court conduct an evidentiary hearing to resolve any such issues of fact, and by not requesting that a jury determine those issues until after the Magistrate already had completed a five-day evidentiary hearing and issued his Report;

C. The District Court had the authority to make factual determinations in deciding whether it had subject matter jurisdiction over Petitioner's Title VII claims under the "single employer" doctrine, because the determination of the "single employer" issues did not implicate the merits of Petitioner's Title VII claims;

D. Assuming, *arguendo*, that Petitioner was entitled to have a jury decide any disputed material issues of fact regarding the "single employer" doctrine, the District Court correctly determined that Petitioner failed to demonstrate the existence of any disputed material issues of fact which would preclude the District Court from entering summary judgment in favor of Respondents on the "single employer" issues.

On May 14, 1999, the Eleventh Circuit affirmed the District Court's Dismissal Order (App. A to Pet.). In so doing, the Eleventh Circuit did not address Respondents'

contention that the District Court had no authority to consider whether it had subject matter jurisdiction under the "single employer" doctrine where only one of the four (4) corporations which Petitioner contends collectively constitute a "single employer" was named as a defendant. Nor did the Eleventh Circuit address Respondents' contention that Petitioner had waived whatever right she may have had to a jury trial on the "single employer" issues. Instead, the Eleventh Circuit held that "single employer" issues involve threshold issues of subject matter jurisdiction and do not implicate the merits of a Title VII claim (App. A to Pet., at 7a-9a).[3] On September 13, 1999, the Eleventh Circuit denied Petitioner's Petition for Rehearing En Banc (App. F to Pet.).

REASONS FOR DENYING THE WRIT

A. Petitioner Failed to Properly Raise Before the Eleventh Circuit the Issue of Whether a "Single Employer" Determination Involves a Threshold Issue of Subject Matter Jurisdiction.

Petitioner contends that this Court should grant certiorari because in those limited instances where a "single

[3] The Eleventh Circuit also did not address Respondents' contention that, even assuming, *arguendo*, that Petitioner was entitled to have a jury decide any disputed material questions of fact regarding the "single employer" issues, the District Court had correctly determined that Petitioner failed to demonstrate the existence of any disputed facts which precluded it from entering summary judgment in favor of Respondents on the "single employer" issues.

employer" determination is necessary in order to determine whether a defendant is an "employer" under Title VII, there is a conflict between the Eleventh Circuit and other circuit courts of appeals as to whether "single employer" determinations involve threshold issues of subject matter jurisdiction, or only involve the **merits** of a Title VII claim. *Compare Scarfo v. Ginsberg*, 175 F.3d 957 (11th Cir. 1999), *with E.E.O.C. v. St. Francis Xavier Parochial School*, 117 F.3d 621, 623 (D.C. Cir. 1997).[4] *But see* 117 F.3d at 626 (where, J. Santelle, in a concurring opinion, acknowledged that the D.C. Circuit had previously held that "single employer" issues did not involve threshold issues of subject matter jurisdiction, but stated that the Eleventh Circuit's determination that such issues do involve threshold issues of subject matter jurisdiction was correct).

However, Petitioner **never argued** to the Eleventh Circuit panel which considered her appeal that the Eleventh Circuit's conclusion that "single employer" issues under Title VII involve threshold issues of subject matter jurisdiction was erroneous.[5] Instead, Petitioner argued

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[4] The Seventh Circuit, in *Sharpe v. Jefferson Distrib. Co.*, 148 F.3d 676, 677 (7th Cir. 1998), had held that "single employer" determinations under Title VII involve the merits of a Title VII claim and do not involve issues of subject matter jurisdiction. Subsequently, however, in *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, ___ U.S. ___, 120 S. Ct. 526 (1999), the Seventh Circuit held that the "single employer" analysis, which was a test formulated by the National Labor Relations Board to determine the appropriate collective bargaining unit, could not be applied in determining whether a defendant constituted an "employer" under Title VII.

[5] Petitioner did not raise this issue until she filed her Petition for Rehearing En Banc ("Rehearing Petition").

unsuccessfully to the Eleventh Circuit that while "single employer" determinations under Title VII do involve issues of subject matter jurisdiction, those issues are intertwined with the merits of a Title VII claim.[6] In view of Petitioner's failure to raise with the Eleventh Circuit the question she has presented for review by this Court, this Court should not consider that question, regardless of the existence of any conflict between the Eleventh Circuit and the District of Columbia Circuit on that issue. *Pennsylvania Dept. of Corrections v. Yeskey*, 524 U.S. 206, 118 S. Ct. 1952, 1956 (1998) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them" (cases cited therein)); *Youakim v. Miller*, 425 U.S. 231, 234 (1976) ("[O]rdinarily, this Court does not decide questions not raised or involved in the lower court"); *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 119 S. Ct. 1961, 1968, n. 3 (1999) (same); *Delta Air Lines v. August*, 450 U.S. 346, 362 (1981) (same).

However, the Eleventh Circuit did not consider the Rehearing Petition because no member of the original Eleventh Circuit panel or any other judge requested that the circuit court be polled on rehearing en banc (App. F to Pet.).

[6] Respondents are unaware of any circuit court of appeals which holds that "single employer" determinations involve **both** issues of subject matter jurisdiction **and** the merits of a Title VII claim.

B. This Court Is Unlikely to Reach the Question Which Petitioner Has Presented for Review

This Court should also deny the requested Writ because it is unlikely that this Court would ever reach the question of whether a "single employer" determination under Title VII involves a threshold issue of subject matter jurisdiction, for determination by the trial court, or involves an element of a cause of action under Title VII for determination by the jury.

Before reaching that issue, this Court would have to consider whether Petitioner waived whatever right she may have to a jury trial on alleged disputed issues of material fact regarding the "single employer" issues. As noted above, Petitioner, through counsel, **expressly consented** to an evidentiary hearing by the District Court on the single employer issues (App. A, at 3a-4a).[7] Accordingly, Petitioner has waived whatever right she otherwise may have had to have a jury consider any issue relating to subject matter jurisdiction. *See Haynes v. W.C. Caye & Co. Inc.*, 52 F.3d 928, 930 n. 3 (11th Cir. 1995) (cases cited therein) (noting that a failure to object to a non-jury fact-finding proceeding constituted a waiver of the right to a jury trial as to factual issues decided in such proceeding,

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[7] As noted in *Garcia*, 104 F.3d at 1262, at the time Petitioner consented to an evidentiary hearing on the "single employer" issues, there was no binding authority, either from the Eleventh Circuit or the Southern District of Florida, as to whether the "single employer" issue was for the trial court or the jury to decide. Thus, if Petitioner intended to preserve her right to a trial by jury on the "single employer" issue, she should have stated her objection to having the District Court decide those issues via an evidentiary hearing.

and holding that a plaintiff who did not raise an objection to a non-jury trial until after the magistrate issued his report and recommendation waived his right to a jury trial); *In re City of Philadelphia Litigation*, 158 F.3d 723, 727 (3d Cir. 1998) (cases cited therein) (where the Third Circuit, in explaining "the well-established rule," adopted by a majority of the circuit courts of appeal, that "a party's participation in a bench trial without objection waives any Seventh Amendment right to a jury trial that the party may have had," noted that "a party should not be permitted to silently acquiesce in a trial court's plan to try an issue non-jury by failing to make a timely objection and later demand a new trial only after it has lost on the merits"); *Fields Engineering & Equipment, Inc. v. Cargill, Inc.*, 651 F.2d 589, 592 (8th Cir. 1981) (oral agreement by plaintiff's counsel, at pretrial conference, to non-jury trial constituted waiver of right to jury trial); *Smith v. Cushman Motor Works*, 178 F.2d 953, 954 (8th Cir. 1950) (party which did not object to the trial court's decision to determine whether a valid contract existed between the parties, rather than having that issue submitted to the jury, waived any right to insist that that issue be submitted to a jury).

In addition, before this Court could determine whether disputed issues of fact regarding "single employer" determinations are to be made by the trial court or the jury, this Court would first have to determine whether the "single employer" doctrine has any application at all to Title VII cases. As noted above, in *Papa v. Katy Indus. Inc.*, 166 F.3d 937, 939-40 (7th Cir.), *cert. denied*, ___U.S.___, 120 S. Ct. 526 (1999), the Seventh Circuit,

overruling its prior decision in *Rogers v. Sugar Tree Products, Inc.*, 7 F.3d 577, 582 (7th Cir. 1994), and disagreeing with the decisions of various other circuit courts of appeals, held that the "single employer" analysis could not be applied in Title VII cases. Instead, the Seventh Circuit held that a Title VII defendant with less than the minimum fifteen (15) employees required under Title VII could not be deemed part of a "single employer" together with a parent corporation or other corporation affiliated with the defendant unless: (a) conditions were present for "piercing the corporate veil" to allow a creditor of the defendant to sue the defendant's parent or other affiliate; (b) the parent or affiliated corporation had **deliberately** left the defendant with less than the Title VII statutory minimum number of employees **for the express purpose** of avoiding liability under Title VII; or (c) the parent or affiliated corporation **actually directed** the alleged discriminatory acts. *Id.* at 940-41.

If and only if this Court concludes that the "single employer" analysis may be applied in the Title VII context, would this Court be in a position to consider whether, in those **limited** instances where there are disputed issues of fact regarding application of the "single employer" doctrine, such issues of fact should be resolved by the trial court or the jury.

In view of the fact that this Court may not reach the question for review which Petitioner has presented, this Court should deny the Petition.

CONCLUSION

For all of the above reasons, Respondents respectfully submit that this Court should deny the Petition.

Respectfully submitted,

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APPENDIX

APPENDIX A – EXCERPTS FROM TRANSCRIPT OF HEARING IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA HELD ON FEBRUARY 20, 1996

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 93-6918-CIV-FERGUSON

ELAINE A. SCARFO,

Plaintiff,

vs.

VICTOR GINSBERG; DBG 94, INC.; DBG 95, INC; and DBG 96, INC., Florida corporations,

Defendants.

APPEARANCES:

For the Plaintiff: ROBERT WEISBERG, ESQ.

For the Defendant: MAURICE BAUMGARTEN, ESQ.

Court Reporter: PAUL HAFERLING
301 North Miami Avenue
Miami, Florida 33128

[2] MR. WEISBERG: Robert Weisberg and Martha Chapman for the plaintiff Elaine Scarfo.

MR. BAUMGARTEN: Maurice Baumgarten for the defendant [sic].

THE COURT: This has been an active file. There is an order of the Magistrate's report and recommendation filed November 9, 1995. There were objections. The objections were overruled.

Then there was another flurry of motions. This is set for trial when?

MR. WEISBERG: March 4th.

THE COURT: I guess the most significant of which has to do with the discovery on financial information and a motion for sanctions.

Was there a motion to dismiss the claim for punitive damages?

MR. BAUMGARTEN: Yes. It was part of a summary judgement motion:

THE COURT: What was the ruling?

[3] MR. BAUMGARTEN: The ruling was the issues of fact that precluded summary judgement on the merits of the Title 7 claims; precluded summary judgement and the punitive damages claims.

THE COURT: Why hasn't discovery been permitted on the financial information? What is the objection?

MR. BAUMGARTEN: The objection was that we still have the issue of the Court's subject matter jurisdiction outstanding. The defendants moved for summary judgement for lack of subject matter jurisdiction under Title 7.

The Magistrate, in his report and recommendation, stated there were issues of fact that precluded the granting of summary judgement, but that the issue of subject matter jurisdiction was [sic] still an outstanding one, and when the Court affirmed the Magistrates report, that still

leaves an issue of subject matter jurisdiction outstanding, and given the fact that it is not clear whether the Court has subject matter jurisdiction, and that an evidentiary hearing is going to have to be held to determine that, we believe that the information about Doctor Ginsberg's financial net worth, which is very sensitive information, is to released now, would be premature, and that is why we did not give the information, and that is why we have asked the Court to allow us to provide that information to the plaintiff once the issue of subject matter jurisdiction has been resolved.

We can get that information to the plaintiff in less than a day, and we will be able to stipulate that Doctor Ginsberg's net worth is a figure in excess of X.

The Court can order discovery. I feel with the Court's subject matter jurisdiction still very much up in the air, that there is no reason why plaintiffs [sic] need [sic] or [4] should have that information at this point.

MR. WEISBERG: What the defendant is raising goes to how the whole trial should be conducted, which would suggest to the Court that the record contains sufficient facts and from which this Court can conclude that Title 7 is implicated, and that we are ready to go forward, and that our suggestion to the Court would be that the case be tried on March 4 and that defendant has indicated they believe the Court, not the jury, should ultimately make the decision on the subject matter jurisdiction, and we don't quarrel with that, and how I would foresee presenting the case is that Judge Moreno did this.

I am looking at a case, Eleventh Circuit case. I have the cite and some of the briefs, but we present the case

simultaneously to the jury, and where there is certain evidence that would just go to subject matter jurisdiction. [sic] We would then just present that to the Court. I can foresee if the jury is dismissed at five o'clock, we can address it at those times, but the matter is that we have sufficient evidence put forward. The Magistrate concluded those facts permit an inference that subject matter jurisdiction has been met, and that the case should go forward.

There is no need for any delay. That is why at this point we are entitled to the financial information to [5] be able to prepare it, to make the presentation at trial.

The defendant suggests we get it someway. Midway through trial is not feasible to allow to us to effectively evaluate it and present it.

MR. BAUMGARTEN: Your Honor, the Magistrate made no such inference about the issue of whether or not the Court has subject matter jurisdiction.

He specifically found those were all subject to issues of fact as to who plaintiff's employer was. Those are all issues that are still out there. The Court does not have original jurisdiction over this claim unless at first it first determines there is subject matter jurisdiction and does not have jurisdiction over the supplemental state law claims.

The issues involving subject matter jurisdiction have nothing to do with the merits of plaintiff's claim, and as counsel for plaintiff pointed out, it is up the Court to resolve those factual issues relating to the subject matter jurisdiction before it can proceed with this case, and we

are willing to stipulate that a Magistrate be appointed to conduct an evidentiary [sic] hearing on that issue, and the parties would be bound by the magistrate's ruling, but we simply can't go forward on the merits of the claim until the Court first determines whether or not it has subject matter jurisdiction.

[6] MR. WEISBERG: Virgo versus Riviera [sic] Beach. In that case Judge Moreno tried a Title 7 claim. The issue in that case was the very issues [sic] as to whether or not it was an employer; whether corporations should be combined; whether or not there was sufficient number of employees, and at the conclusion of the trial he issued findings with respect to that, and it went to the Court of Appeals.

I think that that is the most prudent way to afford this. This case is almost three years old, and under the law, even if we think the Court has decided this was Title 7 Federal jurisdiction, then there would be an assumption that the Court would still go ahead and try the state law claims, since they have been involved with this case.

Now they are intertwined with the Federal claims. They have been with this Court for three years. The suggestion of having another trial before the trial, really would just further delay getting this case resolved.

THE COURT: Who had this case first?

MR. WEISBERG: Judge Marcus. He had it for several months.

* * *

[11] THE COURT: Judge Bandstra heard this case on motion for summary judgement?

MR. WEISBERG: Yes.

THE COURT: I will send it back to him to resolve the issue of subject matter jurisdiction on a motion to dismiss. Any objection to that?

MR. WEISBERG: He has already.

THE COURT: It was not presented to him in that fashion. It was presented as a motion for summary judgement. It's probably very easy for him to take the next step. Let's weigh the evidence now and decide whether there is subject matter jurisdiction. All he decided was the material issues of fact. He did not decide the issue.

MR. WEISBERG: That is correct. Motion to dismiss was heard at the motion for summary judgement.

THE COURT: Let's send it back to him to complete the work.
